

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RAMONA ENRIQUEZ

Claimant

VS.

RIGHT COOP ASSOCIATION

Respondent

AND

LIBERTY MUTUAL INSURANCE COMPANY

Insurance Carrier

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Docket No. 1,029,336

ORDER

Claimant appealed the July 15, 2009, Award entered by Administrative Law Judge Pamela J. Fuller. The Workers Compensation Board heard oral argument on October 16, 2009.

APPEARANCES

Conn Felix Sanchez of Kansas City, Kansas, appeared for claimant. Samantha N. Benjamin-House of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. The record also includes the June 12, 2008, medical report from Dr. Vito J. Carabetta.

ISSUES

This is a claim for bilateral upper extremity injuries. In the July 15, 2009, Award, Judge Fuller found claimant was entitled to receive permanent disability benefits for a 15 percent impairment to the left upper extremity at the shoulder level. The Judge stated, in part:

Dr. Carabetta, the court ordered IME physician, determined that the claimant had full range of motion of both shoulders. Based on that finding, he determined that the correct method of rating the claimant was to base the ratings on the diagnosis related estimate approach. Therefore, the claimant was found to only have injury and permanent impairment from this industrial accident, to her left shoulder. She was given a 15% permanent partial impairment to her left upper extremity at the level of the shoulder. This court finds Dr. Carabetta's opinion to be the most reliable. Based on this finding, the claimant is not found to be permanently totally disabled due to her work related injury.¹

Claimant contends Judge Fuller erred. Claimant argues: (1) she suffered bilateral shoulder injuries while working for respondent; (2) respondent failed to rebut the presumption of permanent total disability; and (3) respondent failed to prove a preexisting impairment in order to reduce compensation under either K.S.A. 44-501(c) or K.S.A. 44-510a. In short, claimant contends she is permanently and totally disabled and requests the Board to enter an award for that disability.

Respondent contends claimant only injured her left shoulder and the Judge, therefore, did not err in denying claimant's request for permanent total disability benefits. Respondent maintains the presumption of permanent total disability does not apply and, even if it did, the evidence establishes that claimant is capable of engaging in some substantial, gainful employment. Accordingly, respondent requests the Board to affirm the July 15, 2009, Award.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds:

Claimant testified she injured her shoulders during the years she worked for respondent. The parties agree claimant sustained a series of repetitive traumas while working for respondent through January 14, 2006. Accordingly, the parties stipulated January 14, 2006, was the appropriate date of accident for this repetitive trauma claim. But the parties were unable to agree upon whether claimant injured both shoulders or only her left shoulder while working for respondent.

Claimant is in her early 50s and resides in Dodge City, Kansas. She attended school for 11 years in Mexico and Spanish is her primary language. Claimant began

¹ ALJ Award (July 15, 2009) at 5.

working for respondent in September 2000 and her job included, among other tasks, handling and lifting 50-pound bags of feed. She is right-hand dominant.

In the early 1990s, claimant injured her *right* shoulder while working for another employer (a packing plant) and she underwent surgery to repair the rotator cuff. Nevertheless, according to claimant, before commencing work for respondent (in September 2000) she had recovered from that right shoulder injury, returned to the workforce, and worked for several employers without any problems. Those jobs, however, did not require the repetitive, heavy lifting that claimant performed for respondent.

Claimant began experiencing bilateral shoulder symptoms while working for respondent. Claimant was not asked when her shoulder symptoms began. But by May 2006, respondent had referred claimant to Dr. Guillermo Garcia, who restricted claimant's activities. Respondent initially accommodated Dr. Garcia's restrictions. But in June 2006 respondent determined it was not able to accommodate claimant. Consequently, claimant did not work from approximately late June until late August 2006, when she resumed working for respondent. Claimant then worked for respondent until January 16, 2007, when she was terminated as respondent purportedly could no longer accommodate her restrictions.

Claimant's bilateral shoulder symptoms continued and in May 2007 she saw Dr. Pat D. Do, a board-certified orthopedic surgeon, for an agreed independent medical examination approved by Judge Fuller. The doctor diagnosed bilateral shoulder pain with impingement. In mid-June 2007, Dr. Do operated on claimant's *left* shoulder and performed a subacromial decompression to remove the impingement and sutured two rotator cuff tears. In late October 2007, Dr. Do determined claimant was at maximum medical improvement and he later rated her as having an 8 percent impairment to the left upper extremity as measured by the *AMA Guides*.² (In measuring claimant's left shoulder impairment, the doctor found a lack of flexion, abduction, adduction and internal rotation.)

Dr. Do did not rate claimant's right shoulder and testified "there wasn't any direct and attributable rating to the right shoulder."³ When the doctor released claimant from medical treatment, he advised her she could return to work.⁴ Dr. Do, however, did recommend certain restrictions for lifting, pushing, pulling, overhead reaching, and climbing, as follows:

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

³ Do Depo. at 13.

⁴ *Id.*

As far as lifting zero to ten pounds I rather she doesn't do it more than a third or two thirds a day. And as far as 11 to 20 pounds occasional period, maybe up to a third [of a] day. No lifting greater than 21 pounds. As far as pushing and pulling, from zero to 20 to 25 pounds, a frequent basis, which is a third to two thirds of a day. And pushing and pulling 26 to 50 pounds from zero percent of the day to a third of the day. And no pushing or pulling greater than 51 pounds. Overhead reaching up to a third of the day. And climbing no more than a third of the day.⁵

Dr. Do indicated he would give those restrictions for both of claimant's shoulders. Nonetheless, the doctor indicated he is unable, at this juncture, to say what caused claimant's present right shoulder problems because he does not believe he was initially asked to address that question⁶ and, therefore, he did not initially evaluate claimant with that issue in mind.⁷ Likewise, the doctor is unable to say whether claimant's present need for right shoulder restrictions is related to her alleged 2006 accident or, instead, to her earlier injury and surgery.

Dr. Do was not asked why he operated on claimant's left shoulder when he initially concluded her right shoulder was worse. In his initial medical report, the doctor indicated claimant was a good candidate for surgery on both shoulders and that it would be her choice which shoulder was operated first. Indeed, the MRI of the right shoulder that Dr. Do reviewed indicated claimant had a severe degenerative AC joint and a possible rotator cuff tear. Likewise, he was not asked why claimant did not have the right shoulder surgery. Dr. Do's last mention of claimant's right shoulder appears in his June 14, 2007, progress notes. And those notes indicate that claimant might consider right shoulder surgery if she derived good results from the left shoulder surgery. The doctor's progress notes from July 2, July 31, August 31, October 4, and October 25, 2007, do not mention the right shoulder.

In January 2008, Dr. Michael H. Munhall of Wichita, Kansas, examined claimant at her attorney's request. The doctor is board-certified in pain management, medical examinations, holistic medicine, and physical medicine and rehabilitation. Claimant told Dr. Munhall that she had an aching pain in her right shoulder that increased with nocturnal positioning on the right side, right arm lifting, carrying, and repetitive movement. She told the doctor she had constant residual left shoulder joint pain that increased with lifting,

⁵ *Id.*, at 15.

⁶ *Id.*, at 16, 17.

⁷ But see the attorneys' initial letter to Dr. Do, which requested him to "please make a diagnosis of [claimant's] injuries that were caused by her work and make treatment recommendations for those injuries." Do Depo., Ex. 3.

carrying, arm movement away from her body or above mid-chest level, and activities that involved left shoulder internal rotation.

Dr. Munhall diagnosed right shoulder impingement syndrome, left shoulder rotator cuff repair, and myofascial pain syndrome in both the right and left upper quadrants, all of which he attributed to claimant's employment with respondent. In the right upper extremity, the doctor found an 11 percent impairment for loss of active range of motion, myofascial pain, and weakness. In the left upper extremity, the doctor found a 19 percent impairment for loss of active range of motion, myofascial pain, and weakness. The doctor indicated he used the *AMA Guides* to rate claimant. Moreover, Dr. Munhall admitted he was unable to determine what portion of claimant's right shoulder impairment preexisted this latest injury.

Dr. Munhall recommended restrictions for claimant's left upper extremity; namely, no working with the left arm above shoulder level, no repetitive work with the left arm more than 18 inches away from the torso; and limit frequent and occasional lifting, carrying, pushing, pulling to no more than 5 and 10 pounds, respectively. Likewise, the doctor recommended restrictions for claimant's right upper extremity; namely, limit working with the arm at the shoulder level to occasionally; limit repetitive arm work to less than 18 inches away from the torso and only occasionally; and limit lifting and carrying to 20 pounds and pushing and pulling to 30 pounds to occasionally and with the elbow at her side.

In June 2008, at the Judge's request, Dr. Vito J. Carabetta evaluated claimant. The doctor recorded a history that claimant's bilateral shoulder pain developed quite progressively for at least 6 months before January 14, 2006. The doctor also noted that claimant indicated her present symptoms on the left were much worse than those on the right. The doctor reviewed May 2006 MRI studies, which showed glenohumeral joint swelling and limited swelling in the subdeltoid and subacromial bursa region with associated acromioclavicular joint arthritic changes in the right shoulder. The studies also showed a small joint effusion, a limited degenerative cyst near the humeral head, and a small amount of subdeltoid and subacromial bursal collection consistent with bursitis in the left shoulder.

During the examination Dr. Carabetta noted claimant's passive range of motion was normal but there was significant evidence she self-limited her active range of motion. In addition, the doctor noted claimant displayed diffuse give-way weakness when he tested the muscles in her upper extremities. The doctor concluded claimant was status-post left shoulder decompression and rotator cuff repair, right shoulder tendinitis/bursitis, and that she had a history of right shoulder surgery.

In his June 12, 2008, report to the Judge, Dr. Carabetta indicated the range of motion method used in the AMA *Guides* would not yield any impairment as claimant has full passive range of motion. Accordingly, the doctor concluded claimant's impairment should be determined using the diagnosis-related estimates model of the *Guides*, under which claimant would receive no new impairment for the right upper extremity and shoulder as it was operated in the 1990s but the left upper extremity had a 15 percent impairment for the 2007 distal shoulder resection and rotator cuff repairs. Moreover, the doctor recommended that claimant avoid using her arms above her chest and that any such activity be performed with negligible weight and for only a brief moment of time.

At her early May 2009 regular hearing, claimant introduced a list of the numerous contacts with potential employers she had allegedly made between September 3, 2007, and the date of the hearing. Part of the list appears photocopied and part of the list appears to be handwritten. Some of the same dates are listed on both the photocopied material and handwritten material. But, for unexplained reasons, there is different information on the photocopied material from that on the handwritten material for the same date. For example, on page 1 of the list (which is a photocopy) claimant indicates that on September 3, 2007, she contacted Good Samaritan regarding a job. But on a handwritten page of the list, she indicates she contacted the Quinta Inn that day. On September 5, 2007, claimant allegedly contacted the Quinta Inn as shown on the photocopy but a handwritten page indicates she allegedly contacted the Asian Lucky Market. Another example is that on September 7, 2007, she allegedly contacted the Super 8 Motel as indicated by a photocopy but her handwritten notes indicate she allegedly contacted Tortilleria Madero.

In short, claimant's exhibit is internally inconsistent, which limits the weight the Board is able to give claimant's representations that she has made an exhaustive job search.

Eventually claimant found work in a cafeteria at the Dodge City Community College, where she worked for about 2 months. But she quit that job. She maintains the work violated her work restrictions.⁸ When claimant testified at the May 2009 regular hearing, she remained unemployed as she had not found any other work.

Only one vocational expert testified in this claim, Steve Benjamin. Mr. Benjamin concluded claimant could earn at least minimum wage and perform substantial and gainful employment without violating the restrictions provided by Dr. Carabetta (which Mr. Benjamin interpreted as primarily restricting claimant from working with her arms above chest level) and Dr. Munhall. In his April 2008 report, Mr. Benjamin listed numerous jobs

⁸ R.H. Trans. at 15.

representative of those that he believes claimant could perform in the open labor market; namely, bench assembler, cleaner, fast food worker, hand polisher, hand packager, hand trimmer, home attendant, sewing machine operator, short order cook and waitress.

The Board concludes the July 15, 2009, Award should be affirmed. The Board agrees that claimant is entitled to receive permanent disability benefits for a 15 percent impairment to her left shoulder only. The evidence establishes that claimant developed symptoms in both shoulders due to the work she performed for respondent. The evidence, however, only establishes that claimant sustained additional impairment in the left shoulder. In that regard, Dr. Carabetta's report was persuasive. Even claimant's medical expert, Dr. Munhall, was unable to state that any part of claimant's present right shoulder impairment was due to the work she performed for respondent.

Any presumption of permanent total disability that may have existed was rebutted by both the expert medical witness testimony and that of vocational expert Steve Benjamin. None of the doctors indicated claimant had been rendered unable to work by her injury. And Mr. Benjamin listed various jobs that claimant could perform without violating recommended work restrictions.

The Judge adopted the functional impairment opinion provided by Dr. Carabetta, whom the Judge selected to perform an independent medical evaluation. As the doctor was an unbiased witness and his report was persuasive, the Board likewise adopts Dr. Carabetta's opinions regarding claimant's permanent impairment. Accordingly, the Board finds claimant sustained a 15 percent impairment to the left upper extremity at the shoulder level due to the repetitive trauma she sustained while working for respondent.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁹ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the July 15, 2009, Award entered by Judge Fuller.

IT IS SO ORDERED.

⁹ K.S.A. 2008 Supp. 44-555c(k).

Dated this ____ day of December, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Conn Felix Sanchez, Attorney for Claimant
Samantha N. Benjamin-House, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge